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July 28, 2010

Lori Houck Cora
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 10, ORC-158
1200 Sixth Avenue
Seattle, WA 98101

Re: **SETTLEMENT COMMUNICATION**
Linnton Plywood Association ("LPA")

Dear Lori:

As you know, EPA is considering the use of an insurance trust to settle the claims against LPA. To that end, please consider the following coverage analysis of the key issue identified by Liberty Mutual to date: the qualified pollution exclusion.

As a preliminary matter, the Liberty Mutual policies span 1966 to 1985, and Liberty Mutual appears to agree that each year provides a new $100,000 limit. All tolled, that would equal $1.9 million, assuming full coverage under each year.

Liberty Mutual recently raised the qualified pollution exclusion as a defense to coverage; however, Liberty Mutual's assessment appears based on an erroneous assumption about how an Oregon court would interpret this exclusionary language. Policies spanning 1966 to 1970 do not contain a pollution exclusion of any kind, so the dispute is focused solely on policies spanning 1970 to 1985. From 1970 to 1982, the qualified pollution exclusion read as follows:

> It is agreed that the insurance does not apply to Bodily Injury or Property Damage caused by or resulting from the discharge of matter (either during the policy period or prior to its commencement) on or into water, land, air or any other real or personal property, ***provided, however, that this endorsement shall not exclude insurance with respect to the discharge of matter, if the discharge is sudden, unexpected,***

unintentional and occurs during the policy period following the effective date of this endorsement.

(a) ***"discharge of matter" means the emission of matter through its release, spillage, leakage*** or by means of dumping, emptying, pumping or due to failure of any equipment or resulting from any other source or cause whatsoever.
(b) "matter" means any substance (gas, liquid, or solid) of any description or origin.

It is further agreed that this endorsement shall not apply to liability arising out of the ownership, maintenance, or use of any automobile.

Form C-1599 11/70 (emphasis added). From 1982 to 1985, the qualified pollution exclusion was amended to read as follows:

This insurance does not apply to Bodily Injury or Property Damage caused by or resulting from the discharge or escape of matter into or on

(a) water, or
(b) air, or
(c) real property, or
(d) personal property.

This exclusion applies to any such discharge that occurs before or during the policy period.

This insurance will apply to a discharge that is

(a) sudden, and
(b) unexpected, and
(c) unknowingly caused, and
(d) unintentional, and
(e) occurs during the policy period.

Form C-GL-21-201 04/80 (emphasis added).

Liberty Mutual erroneously assumes that Oregon courts construe "sudden" to impose a timing component, or in other words, to mean "quick." Instead, the Oregon Supreme Court held that the word "sudden" was ambiguous when used in a qualified pollution exclusion and construed the

phrase "sudden and accidental" to mean "unexpected and unintended." *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 324 Or 184, 212-15, 923 P2d 1200 (1996) (enclosed herewith). Similarly, the Washington Supreme Court held that the precise language used in policies spanning 1970 to 1982, "sudden, unexpected, unintentional," was also ambiguous and should also be construed to mean simply "unexpected and unintended." *Queen City Farms, Inc. v. Central National Insurance Company of Omaha*, 126 Wash2d 50, 94-95, 882 P2d 703 (1995) (enclosed herewith). Based on these cases, Liberty Mutual is unlikely to persuade an Oregon court that the policies require a "quick" discharge to avoid the qualified pollution exclusion. Provided the contamination was "unexpected and unintended" (we are unaware of any evidence to the contrary), the qualified pollution exclusion should not apply.

LPA likely has other arguments, as well, to support a finding of coverage. For example, some courts hold that insurers must provide clear and conspicuous written notice of any reductions in coverage at renewal and, if an insurer fails to do so, any such attempted reductions may be unenforceable. *See, e.g., Or. Mut. Ins. Co. v. Hollopeter*, 251 Or 619, 621, 447 P2d 391 (1968) (quoting *Bauman v. Royal Indem. Co.*, 36 NJ 12, 23, 174 A2d 585 (1961) for the proposition that "[w]here an insurance company purports to issue a policy as a renewal policy without fairly calling the insured's attention to a reduction in the policy coverage, it remains bound by any greater coverage afforded in the earlier policy."). Inasmuch as a pollution exclusion of any kind is conspicuously absent from the first four years of coverage, from 1966 to 1970, Liberty Mutual would be tasked under this line of cases to prove that it sufficiently notified LPA at the 1970 renewal that it revised the renewal policy to include a qualified pollution exclusion. If Liberty Mutual could not sustain its burden, an Oregon court could very well find that none of the qualified pollution exclusions are enforceable to any claim or set of facts, effectively striking the exclusionary language from the policies.

I hope this is helpful to EPA's consideration of the insurance trust as a means to settle the claims against LPA. Please let me know if you have any questions. Thank you.

Very truly yours,

Michael E. Farnell

MEF/ESM/kak
Enclosures
cc: Bill Hutchison (w/o encl.)